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In the

Supreme Court of the United States

No. 563

MANUEL CEDILLO, *et al.*,
Petitioners,

v.

STANDARD OIL COMPANY OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. F. HULSE,
1100 First National Building,
El Paso, Texas,
Attorney for Respondent.

Of Counsel:
W. A. THURMOND,
SCOTT, HULSE, MARSHALL & FEUILLE,
1100 First National Building,
El Paso, Texas.

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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QUESTIONS PRESENTED

Petitioners' statement of the "Questions Presented" is incorrect, as they state questions which were not decided by the Court of Appeals. That Court decided only, with respect to Question A, that Petitioners were not employees of Standard; and that Petitioners' "First Amended Original Petition" did not plead, and therefore did not raise any question of their status under the National Labor Relations Act, as amended. Neither Question B nor C, as stated, are in issue, as they were neither raised in the Trial Court nor passed on by the Court of Appeals. That Court affirmed the judgment of the Trial Court, and held that Petitioners

were not employees of Standard, and secondarily, that the facts show the collective bargaining contract was not negotiated for the benefit of Petitioners.

The Court of Appeals held:

(1) This case by its nature is to be decided on common law principles, and not on the National Labor Relations Act, as amended (29 U.S.C., Secs. 151-168), stating "the 'Plaintiffs' Original Amended Petition', upon which this case was tried, made no mention of the Act and in no way brought the action within its scope."

(2) Plaintiffs (Petitioners) were not employees of Standard Oil Company of Texas.

(3) Plaintiffs (Petitioners) were not third-party beneficiaries of the contract between Standard and the International Union of Operating Engineers, since the evidence shows the parties did not intend to contract for the benefit of Plaintiffs; and, further, there is no evidence to show Plaintiffs accepted the contract, if they had the power to do so.

These holdings are abundantly supported by the record in this case.

THIS IS A COMMON LAW ACTION, AND 29 U.S.C.A. SECS. 151-152 ARE NOT INVOLVED

The history of this case pinpoints the fact that the National Labor Relations Act, as amended, is not involved. Plaintiffs filed their "Original Petition", alleging wrongful discharge, with several references therein to the National

Labor Relations Act and the National Labor Relations Board. The relief prayed for in said "Original Petition" was not only for damages but also for reinstatement, with back pay from date of alleged wrongful discharge, and for an injunction against violation of their contract, which contract was alleged to have been approved by, and executed at the direction of the National Labor Relations Board. The District Court dismissed said petition on the ground the cause of action alleged was in the exclusive jurisdiction of the National Labor Relations Board, but permitted the Plaintiffs to file an amended pleading. The case went to the Court of Appeals at this point, and its opinion, which is reported at *261 Fed. (2) 443*, is set out in Appendix "A" to this Reply. The said Original Petition is set out in Appendix "B" to this Reply.

Plaintiffs filed their "First Amended Original Petition" (R. 1-7), omitting all references to the National Labor Relations Act, as amended, and to the National Labor Relations Board, and abandoned their previous prayer for injunction, reinstatement and back pay for time lost. In the "Amended Original Petition", Plaintiffs sought only a money judgment for wages and benefits on the common law theory that they were employees of Standard, and were third-party beneficiaries under the Collective Bargaining Agreement between Standard and the Internaitonal Union of Operating Engineers (R. 1-7). The "Amended Original Petition" was based entirely on common law, and relief was sought as at common law for breach of contract.

It thus appears Petitioners originally filed this suit on the theory they had rights under the National Labor Relations Act which they were seeking to enforce in Court. It also appears that they omitted from their "Amended Original Petition" all reference to the National Lebor Relations Act and the National Labor Relations Board.

It will be noted, however, that prior to filing this action, Petitioners sought relief from the National Labor Relations Board. They filed several unfair labor practice charges, one against Vowell, and three against Standard (R. 199-205, Ex. D 17-31), all antedating the filing of this action. These charges were investigated by the National Labor Relations Board, which found that no grounds existed upon which to issue a complaint, and on Petitioners' appeal to the General Counsel, he sustained the action of the Regional Director in refusing to issue complaints (R. 199-205, Ex. D 17-13.)

It is, therefore, clear that the Court of Appeals was correct in holding that the repeated references by Petitioners in their brief to the National Labor Relations Act, as amended, and alleged violations thereof by Standard in dealing with Petitioners, are inappropriate, as their cause of action is not alleged to be, and in fact is not, based upon the National Labor Relations Act, as amended. The Court of Appeals correctly states, and holds, that this suit is to be decided upon common law principles.

On the other hand, if it were a suit for violation of said Act, then the rule of exclusive jurisdiction being vested in the Board would apply.

The argument set out in Petitioners' Petition for Writ of Certiorari is an attempt to switch horses in the middle of the stream. They commenced this action, alleging rights under the Act, and thereafter, in order to avoid dismissal on the ground the Board had exclusive jurisdiction, they abandoned that action, in favor of the common law action set forth in their "Amended Original Petition". Trial on the merits was had on the common law action, and resulted in a judgment for Respondent, and that is the judgment which was affirmed by the Court of Appeals. As stated in the latter Court's opinion, Petitioners, in their brief, made repeated references to the National Labor Relations Act. They have continued to attempt to work into the case some violation of the Act, despite the omission of reference to it in their "Amended Original Petition", and despite the rulings of the Board that they did not show themselves entitled to any relief at the hands of the Board. Petitioners are attempting to jockey back and forth between a claimed right under the Act, which would require them to go to the Board for relief, and an alleged right under common law principles, which they have failed to sustain. The only conclusion which can be drawn is that the Court of Appeals correctly analyzed their alleged cause of action, and correctly affirmed the judgment of the Trial Court.

THE COLLECTIVE BARGAINING CONTRACT WAS NOT MADE FOR THE BENEFIT OF PETITIONERS

Plaintiffs base their common law action upon a contract to which they are not parties. To be entitled to the relief prayed for in the "Amended Original Petition", they must, there-

fore, demonstrate that the contracting parties intended the contract to be for their benefit, and that they accepted it, either expressly or by implication. There is ample evidence to sustain the finding of the Trial Court, which was expressly affirmed by the Court of Appeals, that this contract was not made for the benefit of Plaintiffs (R. 286-7, 289). Not only were the Plaintiffs members of another Union, the Hod Carriers, as contracted with the International Union of Operating Engineers, which had the contract with Standard, but the undisputed testimony also is that the common laborer referred to in the I.U.O.E. contract was negotiated for the benefit of one person only, namely, a janitor (R. 238, 239, 240, 247). The Court so found (R. 287). It expressly appears in the evidence that those who negotiated the contract for the Union considered Petitioners to be employees of Vowell, as they were (R. 229), and not of Standard, and they were not discussed or in any way intended to be covered by the contract. In view of the express findings which support the above statements, sustained by ample evidence, there is no basis for contending that this contract was negotiated for their benefit, or that they are entitled to the benefits of it. There is also an express finding by the Trial Court, which is sustained by the evidence, that Petitioners repudiated the I.U.O.E. contract (R. 284, 289). The Court of Appeals held Petitioners must have accepted the contract, as for their benefit, but that they did not do so. Thus they are in no position to assert any rights under it.

THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY HELD PETITIONERS WERE NOT EMPLOYEES OF STANDARD

The testimony is overwhelming that Plaintiffs were employees of Vowell Construction Company, and were not employees of Standard Oil Company of Texas. The Trial Court expressly so found and held (Findings, R. 282-288, and Conclusions of Law, R. 288-290), and this is one of the express grounds upon which its judgment was affirmed by the Court of Appeals. The great preponderance of the evidence in this respect clearly shows that the findings of the Trial Court are correct. They, therefore, come within the provisions of *Rule 52, F.R.C.P.* These findings are concurred in by both the District Court and the United States Court of Appeals, and are, therefore, conclusive. *Graver Tank & Mfg. Co. v. Linde Air Products Co., (1949), 336 U. S. 271, 275, 69 Sup. Ct. 535, 93 L. Ed. 672.* It follows that the judgments of both the Trial Court and the Court of Appeals are correct.

PETITIONERS, HAVING FIRST SOUGHT RELIEF FROM THE NATIONAL LABOR RELATIONS BOARD, ELECTED THAT REMEDY

What is said here about the Plaintiffs having been to the National Labor Relations Board with several unfair practice complaints, prior to filing of this court action also shows, as alleged and presented by Respondent in the Trial Court and in the Court of Appeals, that the Plaintiffs had an election of remedies, and that they elected in the first place to make their complaints to the National Labor Relations

Board; and only after the Board had resolved the issue against them, did they file this action. Under the doctrine of election of remedies, having elected one remedy, and having lost before their chosen tribunal, they should not be allowed to pursue or elect a different course, seeking a different remedy, before a different tribunal.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

J. F. HULSE,

W. A. Thurmond

W. A. THURMOND,
1100 First National Building,
El Paso, Texas,
Attorneys for Respondent.

Of Counsel:
W. A. THURMOND,
SCOTT, HULSE, MARSHALL & FEUILLE,
1100 First National Building,
El Paso, Texas.

CERTIFICATE OF SERVICE

It is hereby certified that service of two copies of this Brief has been made on opposing counsel, by mail, on this the 8th day of December, 1961.

W. A. Thurmond

EXHIBIT "A"

United States Court of Appeals

FIFTH CIRCUIT

December 11, 1958

No. 17239

MANUEL CEDILLO, ALBERTO SANCHEZ, *et al.*,
Appellants,

v.

STANDARD OIL COMPANY OF TEXAS,
Appellee.

[Reported in 261 Fed. (2) 443]

Plaintiffs filed original petition for injunction requiring reinstatement and back pay, and the defendant made a motion to dismiss the petition, on ground that alleged cause of action was within exclusive jurisdiction of the National Labor Relations Board and that plaintiffs had invoked its jurisdiction. Thereafter plaintiffs filed their first amended original petition, thereby superseding original petition and seeking only a money judgment for wages and benefits. The United States District Court for the Western District of Texas, R. E. Thomason, J., entered judgment dismissing the action, and the plaintiffs appealed. The Court of Appeals held

that District Court erred in hearing and considering plaintiff's abandoned original petition and defendant's motion to dismiss the original petition and in then ordering that action should be dismissed.

Reversed and remanded.

Federal Civil Procedure—852, 1742

Where plaintiffs filed original petition for injunction requiring reinstatement and back pay, and defendant made motion to dismiss petition, on ground that alleged cause of action was within exclusive jurisdiction of National Labor Relations Board and that Plaintiffs had invoked its jurisdiction, and thereafter plaintiff filed first amended original petition, thereby superseding original petition, and seeking only money judgment for wages and benefits, federal District Court erred in proceeding to hear and consider the abandoned original petition and defendant's motion to dismiss and in dismissing the action.

Ernest Guinn, El Paso, Texas, for appellant.

J. F. Hulse, El Paso, Texas, Scott, Hulse, Marshall & Feuille, El Paso, Texas of counsel, for appellee,

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM.

On April 8, 1957, plaintiff's filed their original complaint for an injunction requiring reinstatement and back pay. On April 30, 1957, defendant moved to dismiss the complaint on

the ground that the alleged cause of action was within the exclusive jurisdiction of the National Labor Relations Board and that plaintiffs had invoked its jurisdiction. On March 10, 1958, plaintiffs filed their first amended original petition, thereby superseding their original petition, and in it sought only a money judgment for wages and benefits. On April 2, 1958, as a result of an oversight of the amended complaint, which the record does not explain, the district judge "proceeded to hear and consider the plaintiffs' original petition, same being the complaint filed by plaintiffs herein, and to hear defendant's motion to dismiss", and thereupon to order "that defendant's motion to dismiss is granted and the action is hereby dismissed."

In thus basing his action on, and dismissing, an abandoned pleading, the district judge erred, and the judgment must be reversed and the cause remanded for further and not inconsistent proceedings.

Reversed and remanded.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

No. 1820 Civil

MANUEL CEDILLO, ALBERTO SANCHEZ, *et al.*,
Plaintiffs,

v.

STANDARD OIL COMPANY OF TEXAS,
Defendant.

PLAINTIFFS' ORIGINAL PETITION

To the Honorable Judge of Said Court:

Comes now Manuel Cedillo, Alberto Sanchez, Miguel Cadena, Gregorio Ceniceros, Isaac Torres, Manuel Leyva, Juan Torres, Ignacio Gonzales, Ysidro Escobar, Juan Salazar, Gilberto Maese, Jesus Moreno, Roberto Torres, Jose Maria Duran, George Cervantes, Blas Cadena, Maurilio Blanquez, Pedro Duran, Ramon Ortega, Juan Cobos, Jose G. Nunez, Jose Peralta, Jr., G. Arguellas, Lorenzo Gonzalez, Angel Blanquez, Jose Ceniceros, Juan Bueno, Hector Sepulveda, Jose Hector Paquian, Felipe Aguilar, Sixto Maltos, Jesus Cruz, Raymundo Ortega, Manuel Velardo, Manuel Rogalio Reyes,

Cruz Carabajal, Baldonero Medina and Guadalupe Duran, residents of El Paso County, Texas, hereinafter called Plaintiffs, complaining of Standard Oil Company of Texas, a corporation, with Offices in El Paso County, Texas, and for cause of action would respectfully show the Court:

I.

All of the Plaintiffs were employees of the Standard Oil Company of Texas, having been employed from two to ten years as laborers in the Maintenance Division of the Defendant's plant in El Paso County, Texas, the dates of their respective employment being set out opposite the name of each, attached hereto and marked Exhibit A.

II.

During the entire time of their employment, Plaintiffs received pay varying from 60 cents an hour to 1.11 per hour. Defendant has all records showing the exact amount paid said employees during their entire time of employment and is called upon to produce same at the trial hereof.

III.

During the entire time of employment of Plaintiffs, the Defendant had in force and effect a contract with the Operating Engineers, International Union, Local Union No. 552, which union was the designated bargaining agent of all employees of the Company, including these Plaintiffs, except employees in the Laboratory, Clerical, Supervisory, Administrative and Technical work of the plant. Said Contracts

had provision therein for wages, working conditions and benefits for Laborers in the Maintenance Division, covering Plaintiffs. In violation of the terms of the working agreement Defendant paid Plaintiffs fifty cents or more per hour less than they were entitled to under said working agreement and failed and refused to give Plaintiffs fringe benefits to which they were entitled, and failed and refused to give Plaintiffs vacations, sick leave and other benefits all of which were provided for in said contracts. And in violation of said contract now in force, copy of which is attached hereto and made a part hereof and marked Exhibit B, Defendant discharged all of said employees on January 4, 1957, except the following eight who were discharged on November 19, 1956, to-wit: Jesus Cruz, Raymundo Ortega, Manuel Velardo, Alberto Sanchez, Manuel Rogalio Reyes, Cruz Carabajal, Baldomero Medina and Guadalupe Duran. Said Plaintiffs were without cause discharged and other persons employed to perform the same work.

IV.

Said Plaintiffs now have due and owing to them the following appropriate amounts in wages by virtue of said contracts: Manuel Cedillo $4.500.00, Jose Hector Paquian $4,000.00, Hector Sepulveda $4,000.00, Jesus Cruz $1,500.00, Sixto Maltos $9,000.00, Alberto Sanchez $1,500.00, Pedro Duran $1,500.00, Maurilio Blanquez $2,000.00, Jose Ceniceros $4,500.00, Manuel Reyes $1,500.00, Raymundo Ortega $1,500.00, Cruz Carabajal $1,500.00, Juan Bueno $10,000.00, Juan Salazar $6,000.00, Jose Marian Duran

$1,500.00, Jose N. Nunez $6,000.00, George Cervantes $10,000.00, Baldomero Medina $1,500.00, Ramon Ortega $6,000.00, Gilberto Maese $6,000.00, Manuel Velarde $1,500.00, Blaz Cadena $3,500.00, Miguel Cadena $5,000.00, Ignacio Gonzalez $5,000.00, Juan Cobos $10,000.00, Jesus Moreno $5,000.00, Felipe Aguilar $3,500.00, Lorenzo Gonzalez $4,500.00, Isidro Esconedo $10,000.00, Angel Blanquez $5,000.00, Guadalupe Duran $1,500.00, Manuel Leyva $5,000.00, Gregoria Ceniceros $1,500.00, Juan Torres $6,000.00, Isaac Torres $5,000.00, Robert Torres $5,000.00, Jose Peralta Jr. $4,000.00, and Guadalupe Arguellas $1,500.00.

The exact amounts owing is known to the Defendant and Defendant is called upon to produce all records showing pay to Plaintiffs during the time of their employment together with all contracts Defendant had with the Union during the periods of employment referred to above.

V.

The Contracts have been approved by the National Labor Relations Board for employees of the Standard Oil Company of Texas during the time of their employment, and covering Plaintiffs.

VI.

In addition to the wages owing to Plaintiffs, Plaintiffs and each of them are entitled to accumulated benefits under said contract equal to approximately $1,000.00 per year for each employee Plaintiff during the term of his employment, and

Plaintiffs are entitled to full pay during the time they have been wrongfully discharged which amounts to approximately $1,000.00 per Plaintiff owing to this time.

VII.

Plaintiffs and each of them are entitled to be reinstated with full back pay for time lost, and Plaintiffs ask for mandatory injunction requiring the Defendant to comply with the contract of employment referred to and reinstate said Plaintiffs and to pay them the pay called for in said contract and grant them all benefits provided therein.

VIII.

This is a class action the same facts and points of law relating to all of said claims and Plaintiffs are entitled to maintain this suit jointly against Defendant by virtue thereof.

IX.

The contracts referred to herein were all executed under the National Labor Relations Act and direction of the National Labor Relations Board.

X.

Under the present contract laborers in the Maintenance Division are entitled to receive $1.6963 per hour or $13.57 per day for work. Plaintiffs during the time said contract has been in force have received from $1.06 per hour to $1.11 per hour, the exact amount paid each being known to the Defendant and in Defendant's records, which it is called upon to produce.

XI.

The defendant is a foreign corporation, Plaintiffs are residents of El Paso County, Texas, the amount involved exceeds $3,000.00, the suit involves the construction and violation of a collective bargaining contract under the National Labor Relations Act, and this Court has jurisdiction of said suit.

Wherefore, Plaintiffs pray that citation issue as provided by law and that upon trial hereof that they do recover their damages in the total sum of $165,500.00 in back wages, together with all fringe benefits, etc., set out above, $38,000.00 for wages owing since their wrongful discharge, and that Defendant be ordered to reinstate said Plaintiffs and enjoined from violating their contract, all as set out above, and for costs of suit and general relief.

GUINN AND GUINN

By

EXHIBIT "A"

Name	*Employed*	*Discharged*
Manuel Cedillo	7/ 3/52	1/ 4 57
Jose Hector Paquian	/ /52	1/ 4 57
Hector Sepulveda	/ /54	1/ 4 57
Jesus Cruz	6 20/55	10/19/56
Sixto Maltos	8/10/48	1/ 4 57
Alberto Sanchez	6/20/55	10/19 56
Pedro Duran	6/20/55	1/ 4 57
Maurillo Blanquez	/ /55	1/ 4/57
Jose Ceniceros	5/27/52	1/ 4/57
Manuel Reyes	5 20 55	10 19 56
Raymundo Ortega	5 20/55	10/19/56
Cruz Carbajal	5 20/55	10/19/56
Juan Bueno	1/ 6/46	1/ 4/57
Juan Salazar	/ /51	1/ 4 57
Jose Maria Duran	5 20/55	1/ 4 57
Jose N. Nunez	5 22/52	1/ 4/57
George Cervantes	1/ 6 47	1/ 4/57
Baldomero Medina	6/20/55	10/19/56
Ramon Oretga	7/10/52	1/ 4/57
Gilberto Maese	5/28/51	1/ 4 57
Manuel Velarde	6/20/55	10/19/56
Blas Cadena	6/ 9/54	1/ 4 57
Miguel Cadena	5/27/52	1/ 4/57
Ignacio Gonzalea	7/ 3 52	1/ 4/57
Juan Cobos	6/28/47	1/ 4/57
Jesus Moreno	6/10/52	1/ 4 57
Felipe Aguilar	5/16/53	1/ 4 57
Lorenzo Gonzalea	12/19/52	1/ 4/57
Isidro Escobedo	1/ 6 47	1/ 4 57
Angel Blanquez	10/15/52	1/ 4 57
Guadalupe Duran	5 20 55	10 19 56
Manuel Leyva	5/16/53	1/ 4 57
Gregorio Ceniceros	6 20 55	1/ 4/57
Juan Torres	5/ 6 51	1/ 4 57
Isaac Torres	/ 51	1/ 4 57
Robert Torres	/ /51	1/ 4 57
Jose Peralta, Jr.	6 8 53	1/ 4 57
Guadalupe Arguellas	/ /55	1/ 4 57